U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 10 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner filed a motion to reconsider, which the director dismissed. The petitioner then appealed the decision to the Administrative Appeals Office (AAO). The AAO summarily dismissed the appeal. The matter is now before the AAO on a motion to reconsider. The AAO will dismiss the motion.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions with progressive post-baccalaureate experience equivalent to an advanced degree. The petitioner seeks employment as a special education (SPED) teacher for in Maryland. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions with the defined equivalent of an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner filed the Form I-140 petition on October 3, 2011, and the director denied the petition on July 5, 2012, stating that the petitioner had not met the guidelines set forth in the precedent decision *In re New York State Dept. of Transportation* (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998). The petitioner filed a motion to reconsider on August 6, 2012, which the director dismissed on September 17, 2012, stating that it did not meet the requirements of such a motion. The petitioner filed an appeal on October 22, 2012, supplemented by a brief submitted on November 26, 2012. In summarily dismissing the appeal on January 29, 2013, the AAO stated:

> An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v).
>
> The petitioner, on appeal, disputes elements of the director's July 2012 denial decision. The matter on appeal, however, is not the July 2012 denial of the petition, but the September 2012 dismissal of the motion to reconsider. The petitioner must overcome the September 2012 dismissal of the motion before the AAO will revisit the merits of any earlier decision. The present filing is not a timely appeal of the original denial decision, and the AAO will not treat it as though it were.

> Counsel, on appeal, acknowledges the dismissal of the motion to reconsider, but makes no evident attempt to rebut or overcome it. Counsel, instead, essentially appeals the denial as though the motion and its dismissal never happened. Therefore, counsel has not shown that the AAO should withdraw the director's dismissal of the motion in order to clear the way for review of the underlying denial.
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> Because counsel has failed to identify specifically an erroneous conclusion of law or a statement of fact in the director's last decision, counsel has specified no acceptable basis for the appeal and the AAO must summarily dismiss the appeal.

On motion, the petitioner submits a 37-page brief from counsel. In that brief, counsel cites the USCIS regulation at 8 C.F.R. § 103.5(a)(3), and correctly observes that "the petitioner is not required to submit 'new evidence' for her Motion to Reconsider to be considered as properly filed and be given due course for review." The director, however, did not dismiss the August 2012 motion due to a lack of "new evidence."

Counsel states that the director's "17 September 2012 decision did not even state specific reasons" for dismissal of the motion, relying instead on the general statement that the petitioner's motion "does not demonstrate that laws, regulations, policies and/or court decisions were misapplied when making the decision." In the latest motion, counsel disputes the director's conclusion, claiming that the August 2012 motion contained a "rebuttal" to *NYSDOT*. Counsel, however, did not raise this point in the October 2012 appeal. Raising the issue now, in a later filing, does not overcome the summary dismissal of the October 2012 appeal, because it cannot retroactively establish that the AAO's January 2013 decision was in error at the time the AAO rendered that decision. The January 2013 summary dismissal notice rested on the finding that counsel's November 2012 brief contained "no evident attempt to rebut or overcome" the director's September 2012 decision. Counsel, on motion, has shown no error of law or fact in this regard. Instead, counsel makes new assertions.

Counsel has not shown that the AAO erred in summarily dismissing the October 2012 appeal. The AAO will therefore dismiss the motion to reconsider.

Even if the AAO had not summarily dismissed the October 2012 appeal, the petitioner would not have prevailed on the merits.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare

> of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B) Waiver of Job Offer –
>
> > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions with at least five years of progressive post-baccalaureate experience, which the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines as equivalent to a master's degree. (At the time she filed the petition, the petitioner has taken some graduate-level courses but had not yet received a graduate degree.) The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

The *NYSDOT* precedent decision set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to

establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

In the initial filing of the petition, counsel cited the petitioner's "authorship of several Special Education Curriculum Manuals." A section of the initial submission bears the heading "Published Works." While teaching at in the Philippines, the petitioner prepared the *Handbook*. The table of contents divides the handbook into "Background," "Philosophy, Mission-Vision, and Objectives," "General Information," and 'Guidelines, Procedures, Definition of Terms." The petitioner indicated that the preparation of this handbook was a requirement for accreditation, and therefore a matter of administrative routine rather than a rare level of accomplishment. The petitioner's preparation of this document – for which the petitioner identified no publisher and documented no distribution outside of and accrediting authorities – does not support counsel's claim of the petitioner's "authorship of several Special Education Curriculum Manuals."

The petitioner submitted a photocopied page (page 5) from an unidentified newsletter (possibly *The Magister*, a title that appears in the text), containing a short article by the petitioner, identified as "Our featured teacher artist for the quarter." The petitioner's article focused on her experience as a painter, and included examples of her paintings. The article included suggestions on how "a teacher artist can share in her class," but said little about the petitioner's teaching. The newsletter's distribution appears to have been limited to what the petitioner called "our tightly knit community of Filipino teachers in Maryland."

The third item submitted as "Published Material" is an article from the ' published in July 2011. The article stated that the petitioner "and hundreds of other Filipino teachers flew to Maryland in 2007. They were recruited to teach in the United States at the ' The article indicated that the petitioner produced "spectacular results in raising student's [*sic*] abilities in reading and math," and "led several workshops for students and colleagues," but the article did not establish wider adoption of the petitioner's methods. This published material does not indicate that the petitioner or her work have attracted any attention outside of the Filipino community, or had influenced special education at a national level.

Counsel stated that the petitioner's waiver application rested in part on "her track record as a valuable leader, lecturer, trainer and coach of award-winning Special Ed student teams." To establish this claimed track record, the petitioner submitted letters from administrators, teachers, and parents of students. These witnesses praised the petitioner's abilities as a teacher, but did not indicate that her efforts have had or were likely to have an effect beyond the schools where she had worked.

A section of the record headed "Awards/Recognitions" included four certificates from recognizing her "outstanding contribution in the Curriculum Development and the Quality of Special Education Service," and "Exceptional Professional Achievement and Devoted Service to the School." The certificates do not establish any impact or influence on special education in the United States.

On March 2, 2012, the director issued a request for evidence. The director instructed the petitioner to "establish . . . a past record of specific prior achievement with some degree of influence on the field as a whole." In response, the petitioner submitted background documentation about special education, immigration legislation, and other matters. Counsel stated:

> Unlike other applications for National Interest Waiver [NIW], [the petitioner's] NIW Application finds solid basis in law making her proposed employment responsive to the National Interest so determined in said Federal Statutes and Programs. This renders her proposed employment national in scope. . . .
>
> I have obtained approvals for two (2) National Interest Waiver applications involving owners of healthcare staffing agency owners in which no specific federal initiative relates to their proposed employment unlike the one for Special Education teachers.

Counsel did not identify any "specific federal initiative" that "relates to [the] proposed employment . . . [of] Special Education teachers." Instead, counsel cited federal legislation such as the Immigration Act of 1990 and the No Child Left Behind Act (NCLBA), and the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). Counsel did not show that any of these authorities contained specific provisions for national interest waivers for teachers.

Counsel discussed the overall merits of education. These merits are not in dispute, but the national benefit from education as a general concept does not lend national scope to the work of one teacher. *See NYSDOT*, 22 I&N Dec. 217, n.3.

Counsel asserted that labor certification, with its focus on minimally qualified workers, cannot take the petitioner's special talents and achievements into account. Counsel, however, did not establish that the petitioner stands out from other teachers to an extent that would warrant the waiver. Counsel contended that the petitioner "went through a tough screening process," but the record also shows that the petitioner is one of "hundreds of other Filipino teachers" whom recruited more or less simultaneously. The record does not show that became a highly-ranked school

district as a result of this infusion of teachers, all of whom presumably underwent the same "screening process" as the petitioner.

In the July 5, 2012 denial notice, the director concluded that the petitioner had not met the guidelines set forth in *NYSDOT*. On motion from that decision, counsel repeated the claim that there is an "essential difference" between most national interest waiver petitions and those filed on behalf of "highly qualified teachers." Counsel listed some of the supporting exhibits submitted with the petition, and stated: "it has become inexplicable if not unreasonable that her qualifications have been found to be deficient."

In dismissing the motion on September 17, 2012, the director stated: "it is understood that education is in the national interest. However, the impact of a single schoolteacher in one school would not be in the national interest for purposes of waiving the job offer requirement." The director concluded: "The information submitted with the motion does not demonstrate that laws, regulations, policies and/or court decisions were misapplied when making the decision."

The petitioner appealed that decision with a 16-page brief in which counsel quoted the director's first decision, and listed the four certificates that awarded to the petitioner while she worked there. Counsel claimed: "the Immigration Service is requiring more from the beneficiary's credentials and tantamount to having exceptional ability," even though one need not qualify as an alien of exceptional ability in order to receive the waiver. As noted previously, the threshold for exceptional ability is below, not above, the threshold for the national interest waiver. It remains that the petitioner's evidence does not establish eligibility for the national interest waiver. The director did not require the petitioner to establish exceptional ability in her field. Instead, the director observed that the petitioner's evidence does not show that the petitioner's work has had an influence beyond the school districts where she has worked.

Counsel stated "the United States Congress has time and again, responsibly stepped up with well meaning legislations to help our present generation students recover from their dismal performance." Counsel cited the NCLBA as an example of education reform legislation. Counsel did not, however, establish that any of this legislation contained specific provisions granting blanket waivers to teachers. There is no evidence that the NCLBA modified or superseded *NYSDOT*; that legislation did not amend section 203(b)(2) of the Act. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95, 113 Stat. 1312 (1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not shown that the NCLBA indirectly implies a similar legislative change.

Counsel cited high rates of attrition among special education teachers, while at the same time maintaining that the "request for waiver here is not bench marked on shortage." Rather, counsel asserted, the high rate of attrition indicates that United States workers have little interest in working in special education, and therefore granting the waiver "does not hurt in any single manner thinkable

the American work force." Contrary to counsel's claim, this appears to be a variation of a shortage-based claim. The labor certification process is already in place to address such shortages. *NYSDOT*, 22 I&N Dec. 218.

Counsel stated that a waiver would ultimately serve the interests of United States teachers, because if schools "fail to meet the high standard required under the No Child Left Behind (NCLB) Law," the result would be "not only . . . closure of these schools but [also] loss of work for those working in those schools." Counsel does not document "closure of . . . schools" for failing to meet NCLBA requirements, or show that the efforts of the petitioner and "hundreds of other Filipino teachers" have led to schools meeting those requirements. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record does not support counsel's claim to have presented a "rebuttal" to *NYSDOT*. *NYSDOT* is a binding precedent decision. *See* 8 C.F.R. § 103.3(c). Counsel cites no statute, regulation, superseding precedent decision or court decision that retracts, annuls or modifies *NYSDOT* in a manner relevant to this proceeding.

In the latest brief, counsel asserts that section 203(b)(2)(B)(i) of the Act does not contain clear guidance on eligibility for the waiver, and claims that Congress subsequently filled that gap with the passage of the NCLBA. Counsel notes that Congress passed the NCLBA three years after the issuance of NYSDOT as a precedent decision, and claims that "[t]he obscurity in the law that NYSDOT sought to address has been clarified," because "Congress has spelled out the national interest with respect to public elementary and secondary school education" through such legislation. Counsel, however, identifies no specific legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

Counsel states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Counsel, above, highlighted the phrase "national educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." Counsel has, thus, directly quoted the statute that supports the director's conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer

requirement, even if that alien "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the No Child Left Behind Act, nor any other initiatives, create or imply any blanket waiver for teachers. The existence of legislation recognizing the importance of education does not nullify legislation that specifically holds members of the professions (including teachers) to the job offer requirement that Congress created and has never repealed.

By statute, engaging in a profession (such as teaching) does not presumptively entitle such professionals to the national interest waiver. Congress has not established any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. Furthermore, the petitioner has provided conflicting information that casts doubt on fundamental claims and indicates that she has left the occupation on which the waiver request rests. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Therefore, even if the petitioner had submitted a properly filed motion to reconsider, the AAO would not have approved the petition.

ORDER: The motion is dismissed.